Office - Supreme Court, U. S.
APR 15 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 867

WILLIAM E. ANDREWS,

Petitioner,

v.

HOTEL SHERMAN, INC., a Delaware Corporation, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

CORINNE L. RICE,
1 No. LaSalle St.
Chicago, Ill., and

I. E. FERGUSON,
77 W. Washington St.
Chicago, Ill.
Attorneys for Respondents.

RUSSELL BAKER,
1 N. LaSalle St.,
Chicago, Ill.,
Of Counsel.

U. S. Law Printing Co., Phone Lakeview 6581, Chicago, Illinois

INDEX

	Page
Intermediate Order of Circuit Court of Appeals appealed from	2
Statement	2
Argument	4
The Petition shows no valid reason for granting certiorari	4
1. The provisions regulating certiorari in Sec. 874 are procedural	4
2. The provisions in Rules 62 and 73 relating to supersedeas are procedural	5
3. No sufficient reason stated for granting the Writ of Certiorari on an interim order and before the Circuit Court of Appeals had passed upon the question presented by the appeal on the complete record	12

Table of Cases Cited.

Kitchen v. Randolph, 93 U. S. 86	5, 7, 8, 9
Kelman v. Stolz, 1 Fed. Rules Decisions 726	10
New England R. R. Co. v. Hyde, 101 Fed. 397	11
Robinson v. Werber, 189 Fed. 918	11
Sibach v. Wilson & Co., 312 U. S. 1	7, 10
Sage v. Central R. R. Co., 93 U. S. 412	11
United States for Use of Foster Wheeler Corp. v. American Surety Co., 25 Fed. Sup. 700	10

Page

Notes of the Advisory Committee:
On Rule 62 (d) 9
On Rule 73 (e) 10

RULES OF CIVIL PROCEDURE CITED.

Rule 62 (d) 2, 5, 6, 7, 8, 9
Rule 73 (a) 6, 8, 9
Rule 73 (d) 7
Rule 73 (e) 2, 5, 6, 7, 10
Rule 75 (j) 2
Rules of the Supreme Court of the United States:
Rule 38, Sec. 7 13
Rule 19, Circuit Court of Appeals, 7th Circuit 14

STATUTES CITED.

Title 28, Sec. 874 ..... 4, 7
Title 28, Sec. 861 (a); 861 (b) 5
Title 28, Sec. 723 (b) 6
Title 28, Sec. 346 12
Ill. Statutes, Chap. 75, Sec. 3 3

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 867

WILLIAM E. ANDREWS,

Petitioner,

v.

HOTEL SHERMAN, INC., a Delaware Corporation, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

STATEMENT.

This proceeding is an attempt to bring before this court by certiorari, on short record (R. 18), an intermediate order of the circuit court of appeals of the seventh circuit, entered on February 15, 1943.

Said order is as follows (R. 42):

> "It is ordered that supersedeas be granted in this staying proceedings in the District Court during the pendency of this appeal upon the filing of a surety bond approved by the Clerk in the amount of $5,000.00."

The order was entered by the circuit court of appeals on the verified petition of the defendants-appellants presented to the court on a short record (R. 18) provided for under Rule 75 (j) of rules of civil procedure (R. 23-27); (Brief in support of the petition R. 28-32).

Said rule 75 (j) is as follows:

> "Record for preliminary hearing in appellate court. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose."

Under rules of civil procedure 62 (d) and 73 (e) the circuit court of appeals had authority to enter the order of February 15, 1943, the notice of appeal having been filed on February 5, 1943 (R. 3), within three months from November 20, 1942 the date of the judgment (R. 2).

The petition and short record were presented to the circuit court of appeals on February 8, 1943 (R. 22).

In pursuance of said order a bond in the sum of $5,000.00 was given and approved (R. 42).

The petitioner's judgment of November 20, 1942 is fully protected by said bond; and under the Illinois law, ch. 75, sec. 3, the petitioner is entitled to 5 per cent interest on the same from the date of judgment, in the event the judgment is affirmed by the circuit court of appeals.

Within 40 days of the date of the filing of the Notice of Appeal on February 5, 1943 (R. 3) the Complete Record has been filed in the Circuit Court of Appeals, and the said Appeal is being pursued by the Appellants in said Court.

ARGUMENT.

The Petition Shows No Valid Reason for Granting Certiorari.

One of the real questions which was before the Circuit Court of Appeals on our Petition (R. 23) filed under Rules of Civil Procedure 75 (j), and the Appellee's Answer to the same (R. 33) was: Are the provisions of Title 28, Sec. 874 (supersedeas) rules of practice and procedure?

Said Sec. 874 provides:

> "In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the Appellate Court. And in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of ten days. (R. S. § 1007; Feb. 18, 1875, c. 80, § 1, 18 Stat. 318.)"

The Petitioner (Brf. 9) cites statutes substituting appeal for writ of error sections 861 (a) and 861 (b), Title 28.

Section 861 (b) is declared therein by congress as a regulating or procedural statute. Section 861 (b) is as follows:

> "Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

In effect the statute says:

The statute regulating the right to supersedeas, on writ of error, defining the relief which may be had thereon and prescribing the mode of exercising that right and invoking such relief shall be applicable to the appeal which section 861 (a) of this title substitutes for writ of error.

At common law a writ of error was a supersedeas by implication (*Kitchen* v. *Randolph*, 93 U. S. 86 at 87).

Section 874, Title 28 does not give the right, it merely regulates the procedure in obtaining it.

2. Are the new rules of Civil Procedure, 62 (d) Stay on Appeal; 73 (d), 73 (e) Rules of Procedure on Appeal?

Said Rule 62 (d) provides:

> "Stay on Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court."

Rule 73 (e) provides:

> "Failure to File or Insufficiency of Bond. If a bond on appeal or a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court."

The Enabling Act of June 19, 1934, title 28, Section 723 (b) is as follows:

> "The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, *and the practice and procedure in civil actions at law.* Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect. (June 19, 1934, c. 651, § 1, 48 Stat. 1064)."

By said Act, the Supreme Court was authorized to prescribe, by rules for the district courts of the United States, "the practice and procedure in civil actions at law." Further, after the rules took effect it was provided "all laws in conflict therewith shall be of no further force or effect."

In the instant case, we have Rule 62 (d) and 73 (e) which if within the power delegated to the Supreme Court by title 28, Sec. 723 (b) have the force of a Federal statute.

Rule 73 (a) of Civil Procedure provides when an appeal is permitted from a district court to a circuit court of appeals and within the time prescribed a party may appeal

from a judgment by filing with the district court a notice of appeal.

Prior to September, 1938, when the rules went into effect, title 28, sec. 874 prescribed the practice and procedure for making an appeal a supersedeas; but on and after September, 1938, rule 73 (a) (b) (d) and (e) and 62 (d) prescribed the procedure.

Are the rules 62 (d), 73 (d) and 73 (e) within the power delegated to the Supreme Court? Do they regulate practice and procedure?

In the case of *Sibach* v. *Wilson & Co.*, 312 U. S. 1, relied on by the petitioner (Br. 12) at page 14 the court said:

> "The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."

In the opinion of Chief Justice White in the case of *Kitchen* v. *Randolph*, 93 U. S. 86, relied on by the petitioner (Br. 9), the court said at page 87: "At common law a writ of error was a supersedeas by implication, Bac. Atr.; tit. Supersedeas D, 4."

The only substantive provision of section 874, for a stay of process, is the requirement of the bond. Rule 62 (d) provides for the bond.

The rule of procedure, under sec. 874 was "serve or file the writ of error within 60 days after the judgment was entered; and (2) within 60 days after the judgment was entered give the security required by law.

The new rules of civil procedure 73 provide the party may take an appeal by filing with the district court a notice of appeal within the time prescribed by law, to-wit: under sec. 230, within three months from the judgment.

Rule 62 (d) provides for stay upon appeal by giving a bond at or after the time or filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

We think that *Kitchen* v. *Randolph,* 93 U. S. 86, relied upon by petitioner (Brief 9) analyzes sec. 874 as a statute of procedure for securing a stay of process on the writ of error.

The old rule, sec. 874, provided for a stay on appeal by giving a supersedeas bond, the procedure for securing the supersedeas was to take the appeal or writ of error within 60 days after final judgment and give the security required by law within 60 days after judgment or afterward with the permission of the justice or judge of the appellate court.

The procedure under the new rule 73 (a) is to file a notice of appeal within statutory time (Sec. 230—90 days) and 62 (d) give a supersedeas bond at the time of filing the notice of appeal (taking the appeal) or any time afterward.

After the action is docketed in the appellate court, application for leave to file a bond may be made only in the appellate court, rules of civil procedure 73 (e).

Sec. 874 of title 28 and rule 62 each provide, no execution shall issue until the expiration of 10 days after judgment,

but it may issue any time after the said 10 days, except the bond is filed.

Since in 1876 when said *Kitchen* case was decided, sec. 874 provided the rules of procedure, the court was bound by the rules and could do nothing else but grant the motion to vacate the supersedeas.

It is to be presumed that the Supreme Court, before it adopted the said rules, considered title 28, sec. 874, on supersedeas, and considered that the procedure outlined in said section could be altered by the new rules.

The notes of the Advisory Committee on Rule 62 (d) show that title 28, Sec. 874 was clearly before the committee in framing their recommendations.

The note to 62 (d), the provision in question, says:

> "This modifies U.S.C., Title 28 § 874 (supersedeas). See Rule 36 (2), Rules of the Supreme Court of the United States, which governs supersedeas bonds on direct appeals to the Supreme Court, and Rule 73 (d), of these rules, which governs supersedeas bonds on appeals to a circuit court of appeals. The provisions governing supersedeas bonds in both kinds of appeals are substantially the same."

Rule 73 (e) provides as follows:

> "Failure to File or Insufficiency of Bond. If a bond on appeal or a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court."

The Advisory Committee, in its notes points out:

> "Note to Subdivision (e). This is incorporated to make clear the extent of the jurisdiction of the district court to entertain motions for failure to file or for insufficiency of a bond on appeal or a supersedeas bond."

In the case of United States for use and for benefit of *Foster Wheeler Corporation* v. *American Surety Co. of New York,* 25 Fed. Sup. page 700, decided by the district court of the Eastern division of New York November 28, 1938, the Court held that in deciding that the requirements of rules 3 and 4 (d) (4) of Rules of Civil Procedure were met in commencing a proceeding against the United States, the objection of the government that the requirements of title 28, sec. 762 and 763 were not met was immaterial. The court said at page 702:

> "It is to be presumed that the Supreme Court considered the problem of whether or not Sections 762 and 763 of 28 U.S.C.A. were procedural or substantive and concluded that the procedure outlined therein could be altered by the new rules. Rules 3 and 4 (d) (4) are to be regarded as supplanting these statutes. See *Moore, supra,* at 250."

Clearly, the Enabling Act, Title 28, Sec. 723 (b) gives the Supreme Court the right to determine what is practice and procedure.

In the case of *Kelman* v. *Stoltz,* decided May 14, 1941, and reported in 1 Federal Rules Decisions, page 726 at page 729 the District Court of the Northern District of Iowa, relying on the case of *Sibach* v. *Wilson & Co.,* 312 U. S. 1, drew the following conclusions:

"1. Congress has power by legislation to regulate the practice and procedure in the Federal Courts.

2. Congress has power to authorize the Supreme Court to adopt and promulgate general rules regulating procedure for the Federal Courts.

3. When Congress acts upon the subject, the rule prescribed, whether directly by legislation or by the Supreme Court under its congressional authorization, is exclusive.

4. As a corollary from the foregoing propositions, Congress, in legislating or the Supreme Court in adopting rules of procedure, may determine what constitutes procedure.

5. Congress has by the Act of June 19, 1934, authorized the Supreme Court to adopt rules of Civil procedure for the District Courts.

6. The Supreme Court pursuant to such authority has adopted and promulgated such rules, and by Rule 8, subdivision (c), declaring contributory negligence to be a matter of affirmative defense, in effect declared it to be a matter of procedure."

It is submitted that the Supreme Court pursuant to statutory authority has adopted and promulgated Rule 62 (d) declaring the said provision, in said rule, to be a matter of procedure.

In addition to the case of *Kitchen* v. *Randolph,* 93 W. S. 86, decided in 1878, the petitioner relies on the case of *New England Railroad Co.* v. *Hyde,* 101 Fed. 397, decided in 1900 (Brf. 10) and the case of *Robinson* v. *Werber,* 189 ed. 918 (Brf./1) decided in 1911 and the second case reported in 93 U. S. to wit: *Sage* v. *Central Railroad Co.* decided in 1878 (Brf. 10).

Clearly the said cases were decided when the procedure for supersedeas and bond was outlined by Section 874.

It is submitted that the procedure prescribed in said Section 874 has been supplanted by rules of civil procedure 62 and especially 62 (d).

Counsel complains, Brief 6 and 7, that the circuit court of appeals overruled the petitioner's motion asking the said court to state the grounds for its decision.

It is respectfully submitted that the reasons for a court's decision are immaterial, the rule of the court may be right, for a wrong reason, and the reasons for a rule are not under review.

3. No sufficient reason is presented for the allowance of the writ, on an intermediate order of the circuit court of appeals and before the court had passed upon the questions presented by the appeal, on the complete record.

Under Section 346 of the Judicial Code and rule 37 of the Supreme Court, the circuit court of appeals might have certified to the Supreme Court any questions of law concerning which instructions were desired.

Title 28, Section 346 of Judicial Code, provided that:

> "In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propo-

sitions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by appeal."

Further, as hereinbefore pointed out this court, in adopting the two rules, determined that the question at issue here, was one of procedure and that the procedure outlined by Congress in Section 784 was one which could be altered by the new rules.

Further, all the cases cited and relied on by the petitioner arose when the procedure outlined by Congress in Section 874 was the law of the land.

Further there appears to be an infraction of Rule 38, Section 7, of this Court with regard to the printing of the transcript of the record.

Rule 38, Section 7, provides:

"Upon receipt of the certified transcript of the record the clerk shall make an estimate of the cost of printing the record, his fee for preparing it for the printer and supervising the printing, and other probable fees, and shall furnish the same to the party docketing the case. Upon payment of the amount estimated by the clerk, forty copies of the record shall be printed, under his supervision, for the use of the court and of counsel. *But where the record has been printed for the use of the court below* and the necessary copies as so printed are furnished, it shall not be necessary to reprint it for this court, but only to print such additions as may be necessary to show the proceedings in that court and the opinions there."

In this instance, the record was not printed for the use of the Court below. A typewritten petition was presented to the Circuit Court of Appeals under Rule 19 of that Court (R. 28).

Rule 19 of the Circuit Court of Appeals of the 7th Circuit is as follows:

> "1. All motions and petitions shall be reduced to writing.
>
> "2. Counsel shall file with the clerk an original and four copies of each motion or petition, with brief if necessary, together with notice and proof of service upon opposing counsel.
>
> "3. The clerk shall notify opposing counsel of the time allowed for filing, in opposition to the motion or petition, an original and four copies of his answer, with brief if necessary, together with notice and proof of service upon opposing counsel. At the expiration of the time allowed, the clerk shall submit the matter to the court, and no oral argument shall be permitted, except by order of the court."

The Short Record provided under Rule 75 (j) of Civil Procedure is not required to be printed, therefore, was not, in this instance printed for the use of the Court below.

The cover of the Transcript of Record in this instance announces that the Record was printed at 210 West Jackson Blvd., Chicago.

The conclusion is that it was not printed under the supervision of the Clerk of this Court as by Supreme Court Rule 38, Sec. 7 provided.

It is submitted that in 1943, Rules of Civil Procedure, 62 (d) and 73 (d) and 73 (e) had modified the procedure

prescribed by Title 28, Sec. 874, and the notice of appeal having been filed on February 5, 1943, R. 3 within three months after the entry of judgment on November 20, 1942, (R. 2), the Circuit Court of Appeals correctly granted the petition for a stay and fixed the bond.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

CORINNE L. RICE,
1 North La Salle Street,
Chicago, Illinois,
Chicago, Illinois,

I. E. FERGUSON,
77 West Washington Street,
Chicago, Illinois,
Attorneys for Respondents.

RUSSELL BAKER,
1 North La Salle Street,
Chicago, Illinois,
Of Counsel.